2003

State of Utah v. Noe Rodriguez Carreno : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff/Appellee, :

v. :

NOE RODRIGUEZ CARRENO, :

Defendant/Appellant :

Case No. 20030927-CA

BRIEF OF APPELLEE

APPEAL FROM CONVICTION FOR ATTEMPTED AGGRAVATE MURDER, A FIRST DEGREE FELONY; AGGRAVATE BURGLARY, A FIRST DEGREE FELONY; AGGRAVATE KIDNAPPING, A FIRST DEGREE FELONY; AND DAMAGING O INTERRUPTING A COMMUNICATION DEVICE, A CLASS MISDEMEANOR, IN THE FIRST JUDICIAL DISTRICT COURT I AND FOR BOX ELDER COUNTY, STATE OF UTAH, TH HONORABLE BEN HADFIELD, PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of Attempted Aggravated Murder, a first degree felony, in violation of UTAH CODE ANN. § 76-5-202; Aggravated Burglary, a first degree felony, in violation of UTAH CODE ANN. § 76-6-203; Aggravated Kidnapping, a first degree felony, in violation of UTAH CODE ANN. § 76-5-302; and Damaging or Interrupting a Communication Device, a class B misdemeanor, in violation of UTAH CODE ANN. § 76-6-108; in the First Judicial District Court in and for Box Elder County, State of Utah, the Honorable Ben Hadfield, Presiding. This Court has jurisdiction of the appeal under UTAH CODE ANN. § 78-2a-3(2)(j) (2001).

STATEMENT OF THE ISSUES AND STANDARDS OF APPELLATE REVIEW

Issue I: Did the trial court abuse its discretion in denying defendant's first request

for appointment of an investigator? Even if denial of the motion was error, was it harmless?

Standard of Review: A trial court's decision regarding a motion for appointment of an investigator is reviewed for abuse of discretion. *State v. Hancock,* 874 P.2d 132, 135 (Utah App. 1994), *cert denied*, 883 P.2d 1359 (Utah 1994).

Issue II: By not objecting to the jury instructions at trial, did defendant fail to preserve his claim that jury instructions # 30 and # 33 were improperly given?

Standard of Review: "Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice." Utah R. Crim P. 19(e).

Issue III: By not asserting in the trial court that the Information was defective, did defendant fail to preserve this issue for appeal?

Standard of Review: When a defendant makes no objection to the validity of the Information to the trial court, he is precluded from raising the issue on appeal. *State v. Hall*, 671 P.2d 201, 202 (Utah 1983).

Issue IV: Did the defendant receive effective assistance of counsel?

Standard of Review: Claims of ineffective assistance of counsel raised for the first time on appeal are reviewed for correctness. *State v. Diaz*, 2002 UT App. 288, ¶ 13, 55 P.3d 1131; *State v. Silva*, 2000 UT App 292, ¶ 12, 13 P.3d 604.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rules are contained in Addendum A:

Utah Code Ann. § 77-32-301 (2004).

STATEMENT OF THE CASE

Defendant was charged by Information with attempted aggravated murder (two counts), aggravated burglary, aggravated kidnapping, and interrupting a communication device (R. 1-3). Following a preliminary hearing, defendant was bound over for trial (R. 26-28).

Defendant filed a motion to appoint an investigator (R. 31-34). The motion was denied (R. 37-39). Defendant later filed a second or supplemental motion to appoint an investigator (R. 64-72). A hearing was held at which defendant was advised that he could hire an investigator at a total cost of up to $500.00 (R. 75). The written Order granting appointment of an investigator was filed several weeks later (R. 78-79).

Following a jury trial, defendant was convicted of one count of attempted aggravated murder, aggravated burglary, aggravated kidnapping, and interrupting a communication device (R. 96-99, 171-72, & T. 213).[1] He was acquitted of one count of Attempted Aggravated Murder. *Id.*

On May 22, 2001, defendant was sentenced to prison terms of five years to life on each of the first degree felonies and to a term of 6 months on the class B misdemeanor. The prison terms were to be served concurrently (R. 177-79, 181-82 & ST. 6-7).

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[1] Although the transcript of trial and sentencing were filed in the Appellate court, they do not have Bates stamp numbers on them. Therefore, in this brief, references to the trial transcript will be cited as (T. page #). References to the sentencing transcript will be cited as (ST. page #).

On July 17, 2002, defendant filed a pro se notice of appeal (R. 187). At the same time, he filed a motion to correct illegal sentence (R. 188-89). The Utah Supreme Court stayed the appeal and the matter was temporarily remanded to the trial court with instructions to determine whether defendant was indigent, and if he was, to appoint counsel on appeal (R. 198-99). The trial court found defendant indigent and appellate counsel was appointed (R. 204-5, 240-41). However, on May 27, 2003, defendant's appeal was dismissed for lack of jurisdiction because the notice of appeal was untimely (R. 255-6).

On May 15, 2003, new counsel appointed to represent defendant on appeal filed a motion for extraordinary relief under the criminal case number 001100703 (R. 247-253). The county prosecutor filed a motion to dismiss defendant's motion for extraordinary relief. The prosecutor argued that defendant's proper avenue for relief was to file a civil petition under the Post-Conviction Remedies Act and Utah Rule of Civil Procedure 65C (R. 257-278).

The district court ruled that the petition was essentially a writ of error coram nobis, recognized as proper under certain circumstance by the Utah Court of Appeals in *State v. Rees*, 63 P.3d 120 (Utah App. 2003) (R. 279-283). The Utah Supreme Court has accepted certiorari review of the *Rees* case. The prosecutor asked the court to stay the hearing in the matter until after the Supreme Court's decision in *Rees* (R. 291-91). The motion was granted and the matter was stayed (R. 306).

Defendant apparently then filed a civil petition for post-conviction relief, case no. 030100711. However, the Office of the Attorney General was not informed that a civil

petition had been filed and was never requested to file a response.[2] Nevertheless, the trial court held a hearing with the county prosecutor and defendant's appellate counsel (R. 324-26). The court heard testimony from defendant's trial counsel, Justin Bond. *Id.* At the conclusion of the hearing, the court made the following ruling:

> The court does not find any specific showing regarding the filing of the appeal. In the interest of justice, the court finds the defendant should be allowed to be re-sentenced with the defendant's right to appeal within 30 days.

(R. 325).[3]

On October 27, 2003, the district court resentenced defendant nunc pro tunc. All of the original terms of the sentence were re-imposed (R. 325-28). On November 18, 2003, defendant filed his current appeal (R. 329-30).

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[2] When the district court receives a petition filed under the Post-Conviction Remedies Act, the court must perform an initial review to determine whether the petition should be summarily dismissed. Utah R. Civ. P. 65C(g)(1). If the "court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General." Utah R. Civ. P. 65C(h).

[3] This ruling is incorrect, but now unreviewable. The district court should not have granted the petition for post-conviction relief without making a finding that the defendant had been unconstitutionally denied his right to appeal. *See Manning v. State*, 2004 UT App 87, 89 P.3d 196. Normally, the State has the right to appeal a district court's grant of a petition for post-conviction relief. *See* Utah Code Ann. § 78-35a-110 and Utah R. Civ. P. 65C(o). However, in this case, the county prosecutor did not file any appeal and the Office of the Attorney General was not aware that this petition had been granted until receipt of this appeal. Therefore, any attempt at this point to appeal the grant of the petition for post-conviction relief would be untimely.

STATEMENT OF THE FACTS[4]

On November 26, 2000, the victim, Mr. Lee Duong, and his cousin, Mr. Abel Carrazco, were at Kristy Lamb's apartment (T. 60-61, 77, 96-97). Ms. Lamb was the defendant's wife, but they were separated (T. 76). Late at night, maybe midnight or one o'clock in the morning, they heard a knock on the door (T. 60-61, 77). Ms. Lamb went to the door, looked out the peep-hole, and saw that it was the defendant (T. 78). She did not open the door (T. 78). The defendant then started pounding on the door, hitting it very hard, trying to force the door open (T. 62-63, 78). Ms. Lamb was leaning against the door, trying to keep it closed (T. 78). Defendant broke or kicked the door open and forced his way into the apartment (T. 62-64, 78, 98).

When defendant entered the apartment he was holding a gun, pointing it at Ms. Lamb and Mr. Duong (T. 63-64, 79). Ms. Lamb began screaming and Mr. Duong was telling her to "call the cops." (T. 64). Ms. Lamb ran over to the phone and tried to dial 9-1-1, but defendant pulled the phone jack out of the wall (T. 79).

Mr. Duong hit the defendant in the face with his right hand (T. 65). He was then going to follow through with his left, but Ms. Lamb was trying to get in between the two of them (T. 65). Ms. Lamb was trying to grab the gun, trying to protect Mr. Duong from getting shot (T. 80-81). Mr. Duong tried to push Ms. Lamb out of the way (T. 65). Mr. Duong then heard the gun fire and felt a burning sensation on his arm (T. 66).

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[4] The facts are recited in a light most favorable to the jury's verdict. *State v. Hancock*, 874 P.2d 132, 133 (Utah App.), *cert denied*, 883 P.2d 1359 (Utah 1994).

The bullet went through the sleeve of Ms. Lamb's shirt before hitting Mr. Duong (T. 73, 84-85). The bullet went through Mr. Duong's arm, then into his torso, where it punctured his lung, and then lodged near his spine (T. 70, 175). The doctors were unable to remove the bullet and it is still lodged near Mr. Duong's spine (T. 70).

After being shot, Mr. Duong ran out the door of the apartment towards the apartment building across from Ms. Lamb's (T. 67). He knocked on the door, but no one answered (T. 67). The defendant tried to pull Ms. Lamb out of her apartment (T. 81). When she got away from him, the defendant chased after Mr. Duong (T. 81). Mr. Duong saw the defendant coming after him with the gun, so he began running again (T. 67). Mr. Duong ran back toward Ms. Lamb's apartment, and as he ran, he heard another gunshot (T. 68). He also heard the defendant say in Spanish, "I'm going to kill you." (T. 75). Mr. Duong fell down on the front porch (T. 68, 81). Ms. Lamb was there yelling at defendant, and she stopped defendant from coming back into the apartment (T. 68, 81).

Mr. Duong ran back inside the apartment and out the back window (T. 68-69). He ran towards the park, where he saw his cousin, Mr. Carrazco, and told him he was shot (T. 69). Mr. Carrazco had earlier run out the back of the apartment (T. 82, 99).

Defendant then grabbed Ms. Lamb again and tried to get her to go home with him (T. 82). He grabbed her shirt, pulled her outside, and got her as far as the corner. *Id.* Ms. Lamb was yelling for help. *Id.* She saw a friend of hers on the sidewalk and yelled at him to call the police (T. 82, 116). At that point, defendant let go of her and ran towards the parking lot (T. 82-83). Defendant drove away in a van (T. 83).

Ms. Lamb went back to her apartment, where she noticed blood on the cement in front of her door (T. 83-84). She went to a friend's house and asked her to call the police (T. 84). She then borrowed her friend's car, found Mr. Duong and Mr. Carrazco, and drove to the hospital (T. 69-70, 84).

When the police arrived at Ms. Lamb's apartment, they saw drops of blood between buildings number 1 and 2 (T. 103-04). They also saw that the apartment door was broken. The locking bolts and the door handles were on the ground and the door was open (T. 104). There were footprints on the door, and it looked like it had been kicked in from the outside (T. 104). The police retrieved a brass shell casing from the floor of the living room (T. 105, 111).

Police contacted defendant and searched his home. They found a gun on the floor in the corner of the bottom of the bathroom vanity (T. 132-34). Testing by the Utah State Crime Lab established that the shell casing found in Ms. Lamb's apartment came from this gun (T. 167). Defendant had initially denied that there was a gun (T. 137, 141). After police found the gun, defendant claimed that the gun was in his coat pocket, and as Ms. Lamb was trying to pull Mr. Duong off, the gun just went off (T. 150-51). When police searched defendant's home, they did not find any clothing with a bullet hole through the pocket (T. 163-64). Defendant also claimed that when he ran outside, the gun fell out of his pocket, and Mr. Duong picked up the gun and shot two rounds through the van at defendant (T. 152). But when police checked the van they did not find any bullet holes (T. 152).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying defendant's first request for an investigator because defendant's motion failed to raise any specific issues requiring an investigator. Even if denying the motion was error, the error was harmless because the court granted defendant's second request for an investigator.

Because he did not object to the jury instructions at trial, defendant failed to preserve for appeal his claim that the court gave erroneous jury instructions. In addition, the instructions given were not erroneous.

Because he did not assert in the trial court that the Information was defective, defendant is precluded from raising this issue on appeal.

Defendant's counsel was not ineffective for failing to object to the jury instructions because the jury instructions were not erroneous. In addition, defendant has failed to establish that his counsel was ineffective for failing to properly investigate, because he has failed to establish that his counsel did not properly investigate, and he has also failed to establish what additional information further investigation could have discovered.

ARGUMENT

I. The trial court did not abuse its discretion in denying defendant's first request for appointment of an investigator. Even if the denial was error, it was harmless.

Defendant filed his first motion to appoint an investigator on January 16, 2001 (R. 31-34). That motion was denied (R. 37-39). Defendant's first motion to appoint an investigator was only three pages long. *Id.* Defendant alleges that denial of the first motion was error.

Defendant argues that in its denial of the first request for appointment of an investigator, the court "does not really address why a private investigator is not necessary, but tends to base his decision on counsel's failure to meet the 'court mandated deadline.'" (Brief at 11). To the contrary, the court specifically stated that it was denying the motion because no specific issues were raised requiring the assistance of an investigator.

> The Court has reviewed the Motion and Memorandum to Appoint an Investigator and finds the arguments advanced by counsel unpersuasive. No specific issues are raised which would require the assistance of an investigator. The bald assertion, "there is evidence supplied to counsel that the two alleged victims were presumed to be dangerous," does not rise to the level compelling the appointment of an investigator. Defense counsel can work with the defendant and subpoena whatever witnesses the defense deems necessary.

(R. 37). As to the fact that the motion was untimely, the memorandum simply said: "The Court is denying the Motion to Appoint Investigator on the merits. However, defense counsel is also admonished that the deadlines set by the Court mean exactly what they say." (R. 38).

An indigent defendant has a Constitutional right to the assistance of counsel, and the right to a fair opportunity to present his defense. U.S.C.A., Const. Amend. VI and XIV; Utah Code Ann., Const. Article I; *Ake v. Oklahoma*, 470 US. 68, 105 S.Ct. 1087 (1986). The Utah Code of Criminal Procedure requires that an indigent defendant shall be provided with "the investigatory resources necessary for a complete defense." Utah Code Ann. § 77-32-301(3) (2004) (addendum A).

However, "a defendant is entitled to a hired investigator only when (1) the defendant has exhausted other means of investigation and (2) it is necessary for a complete defense."

State v. Price, 909 P.2d 256, 264 (Utah App. 1995). The trial court has discretion to determine if there is a reasonable basis on which to justify appointment of an investigator. The "law requiring an investigator as one of the minimum requirements does not contemplate an investigator unless there is some reasonable basis to justify an investigator spending time and incurring expenses." *Washington County v. Day*, 447 P.2d 189, 192 (Utah 1968); *and see State v. Cote*, 492 P.2d 986, 987 (Utah 1972).

"Trial courts must determine the circumstances under which an investigator is necessary for a complete defense, and trial courts have some discretion in that determination." *State v. Hancock,* 874 P.2d 132, 135 (Utah App. 1994), *cert denied*, 883 P.2d 1359 (Utah 1994). An appellate court will not reverse a trial court's disposition of a motion for appointment of counsel absent abuse of discretion. *Id.*

The trial court in this case denied defendant's first request for appointment of an investigator because it found the reasons presented by defense counsel unpersuasive. The court found that defendant's motion did not raise any specific issues "which would require the assistance of an investigator." (R. 37). Defendant has failed to argue that the court's findings were in error. He has therefore failed to establish that the court's decision not to grant the first motion for appointment of an investigator was an abuse of discretion.

In addition, even if denial of the first motion for appointment of an investigator was error, any error was harmless because defendant's request for appointment of an investigator was eventually granted (R. 64-72, 75, 78). An error is harmless if it "was sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the

case." *State v. Nichols*, 2003 UT App 287, ¶ 48, 76 P.3d 1173. Defendant has failed to establish any reasonable likelihood that delay in granting the motion affected the outcome of the case.

Approximately two weeks after the first motion was denied, defendant filed a second or supplemental motion for appointment of an investigator (R. 64-72). The supplemental motion was nine pages long, and included additional facts and arguments that were not in the first motion. *Id.* A hearing was held and the supplemental motion was granted (R. 76, 78).[5]

Defendant alleges that the court's eventual granting of the motion for appointment of an investigator came so near the trial that it did not cure problems caused by the earlier denial (Brief at 12). However, defendant fails to allege or establish what "problems" were caused by the first denial. In addition, the motion was granted approximately seven weeks prior to trial. The hearing was held on February 27, 2001 (R. 75). Defendant was advised at that hearing that he could hire an investigator at a total cost of up to $500.00 (R. 76).[6] The written order for appointment of an investigator was not filed until March 22, 2001 (R. 78). But defendant knew on February 27, 2001, that his motion was granted. Trial in the criminal case was held on April 17, 2001. Therefore, defendant's motion for appointment of an investigator was granted approximately seven weeks prior to trial.

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[5] The hearing has apparently not been transcribed.

[6] Although Defendant states that the order granting the request for an investigator "severely limit[ed] the amount that could be expended" (Brief at 11-12), he fails to present any argument challenging the dollar amount.

Defendant argues that the "[t]rial court's denial and limitation of Defendant's request for an investigator was error." (Brief at 9-10). However, defendant fails to assert why it was error, and fails to address how he was prejudiced by the error. Defendant has failed to establish that the timing of the order was an abuse of the court's discretion, or that he was harmed by the fact that his motion was granted approximately seven weeks prior to trial. *See e.g. State v. Cabututan*, 861 P.2d 408, 411-412, *rhrg denied* (Utah 1993) (we "find no error in the belated appointment").

II. By not objecting to the jury instructions at trial, defendant failed to preserve this issue for appeal.

Defendant alleges that the trial court erred in giving jury instructions # 30 and # 33 (Brief at 12-14). However, as defendant acknowledges in his brief, his trial counsel never objected to jury instructions # 30 or # 33 (Brief at 2-3, 16). Therefore, this issue was not preserved for appeal. The Utah Rules of Criminal Procedure state that "[u]nless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice." Utah R. Crim. P. 19 (e); *and see State v. Hamilton*, 2003 UT 22, ¶ 53, 70 P.3d 111. Defendant does not rely on the manifest injustice exception, nor does he claim plain error or exceptional circumstances (Brief at 12-14).

Because defendant's trial counsel did not object to jury instructions # 30 or # 33, he failed to preserve the issue for appellate review. *Hamilton*, 2003 UT 22 at ¶ 53; *State v. Tueller*, 2001 UT App. 317, ¶21, 37 P.3d 1180; *Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT

App. 355, ¶ 16, 993 P.2d 222, 226; *State v. Anderson*, 929 P.2d 1107, 1108-9 (Utah 1996); *Penrod v. Carter*, 737 P.2d 199, 200 (Utah 1987); *State v. Hall*, 671 P.2d 201, 202 (Utah 1983).

A. Defendant is not entitled to review for manifest injustice because he affirmatively represented to the court that he had no objections.

"To review an instruction under the manifest injustice exception, counsel must have *failed* to object to the instruction." *Hamilton*, 2003 UT 22, ¶ 54. In the past, courts have reviewed jury instructions under the manifest injustice exception "where, instead of objecting, counsel 'merely remained silent at trial.'" *Id.*, (*citing State v. Medina*, 738 P.2d 1021, 1023 (Utah 1987). However, if counsel "affirmatively represented to the court that he or she had no objection to the jury instruction, [the appellate courts] will not review the instruction under the manifest injustice exception." *Id.*; *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996); *State v. Perdue*, 813 P.2d 1201, 1206 (Utah App 1991).

Affirmatively leading the trial court to believe there was nothing wrong with the instructions amounts to "invited error." *Anderson*, 929 P.2d at 1109. Under the invited error doctrine, "a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *Id.* (*citing State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993)); *and see State v. Montiel*, 2004 UT App 242 ¶ 14, 95 P.3d 1216.

In this case, the court gave counsel a copy of the final draft of the jury instructions. The court then asked: "Does the defense approve then and pass the proposed packet 1 through 36 and the verdict form?" (T. 169). Defense counsel replied "Yeah." (T. 169).

Defense counsel affirmatively approved the jury instructions. Even if giving this instruction was error, it was invited error. "[W]here invited error butts up against manifest injustice, the invited error rule prevails. *Perdue*, 813 P.2d at 1205; *and see State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742. Therefore the manifest injustice exception does not apply in this case. *Id.* at 1204; *State v. Hamilton*, 2003 UT 22 at ¶55.

B. Even if the instructions were reviewed for manifest injustice, defendant would not be entitled to relief because the instructions were properly given.

Even if jury instructions # 30 and # 33 were reviewed for manifest injustice, defendant would not be entitle to relief, because the trial court did not err in giving these jury instructions. When faced with a claim that an instructional error should be considered on appeal because failure to do so would result in manifest injustice, the appellate court will review the claim under the same standard used when determining the presence of plain error under Utah Rule of Evidence 103(d). *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996). The standard employs a two-prong test. First, the error must be "obvious." Second, the error must be of "sufficient magnitude that it affects the substantial rights of a party." *Id.*

1. Jury Instruction # 30 was properly given.

Defendant argues that jury instruction # 30 was an impermissible comment on his failure to testify (Brief at 12). However, this type of jury instruction has been approved in Utah, and the trial court did not err in giving it. This claim fails to meet the requirements for review for manifest error. Not only was there not an "obvious" error, but there was no error at all. Jury Instruction # 30 advised the jury of a defendant's right to testify on his own

behalf, or to choose not to testify.

> You are instructed that a defendant is a competent witness in his own behalf and has the right to go upon the witness stand and testify if he chooses to do so. However, the law expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. If he is satisfied with the evidence which has been given, there is no reason for him to add thereto.
>
> In deciding whether or not to testify, a defendant may choose to rely on the state of the evidence and upon the failure, if any, of the State to prove every element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the State so as to support by itself a finding against a defendant on any such element.
>
> So, in this case, the mere fact that the defendant has not availed himself of the privilege which the law gives him should not prejudice him in any way. It should not be considered as any indication either of his guilt or innocence. The failure of a defendant to testify is not even a circumstance against him and no presumption of guilt can be indulged in the minds of the jury by reason of such a decision on his part.

(R. 164).

Defendant argues that he did not request instruction # 30, and that it had the likely effect of highlighting his failure to testify (Brief at 13). Defendant's authority in support of his argument consists of case law from other states, and from a dissent. *Id.* However, Utah case law authorizes giving this type of instruction, even when not requested by the defendant. Therefore, giving this instruction was not error.

In *State v. Nomeland*, 581 P.2d 1010 (Utah 1978), a similar jury instruction was given.[7] Nomeland argued that the instruction "cast an aspersion on his constitutional right

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[7] The jury instruction in *Nomeland* stated: "A defendant in a criminal case is not required to testify in his own behalf. The law expressly gives him the privilege of not testifying if he so desires. The fact that defendant Jack Warren Nomeland has not taken the witness stand must not be taken as any indication of his guilt, nor should you indulge

not to testify." *Id.* The *Nomeland* court noted that a number of states had considered the issue.[8] However, it held that the better rule was that an instruction regarding the failure of a defendant to testify was not erroneous even though the defendant did not request the instruction. *Nomeland*, 581 P.2d at 1011; *and see State v. Jefferson*, 353 A.2d 190 (R.I. 1976); *State v. Garcia*, 505 P.2d 862 (N.M. Ct.App. 1972); *State v. Harvey*, 187 So.2d 59 (Fla.App. 1966), *cert denied* 386 U.S. 923, 87 S.Ct. 894 (1967).[9]

Utah's position finds inferential support in *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112 (1981). There, the trial judge refused to give a similar instruction when requested by the defendant. The United States Supreme Court held that the instruction must be given if requested by the defendant.

> While no judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

Carter v. Kentucky, 450 U.S. at 288.

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in any presumption or inference adverse to him by reason thereof. The burden remains with the state, regardless of whether the defendant testifies in his own behalf or not, to prove by the evidence his guilt beyond a reasonable doubt." *Nomeland*, 581 P.2d 1010 (Utah 1978).

[8] The *Nomeland* court referred to the case defendant relies upon. It stated that in *Griffin v. California*, 380 U.S. 609 (1965), the "court told the jury that they could take the defendant's failure to testify into consideration during their deliberations. This of course, would be improper." *Nomeland*, 581 P.2d at 1011.

[9] Similar jury instructions concerning a defendant's right not to testify have been used in more recent Utah cases. However, it is unclear in these cases whether the defendant requested the instruction. *See State v. Tillman*, 750 P.2d 546, 555 (Utah 1987) and *State v. Eagle*, 611 P.2d 1211, 1214 (Utah 1980).

Carter holds that it is error for a court to refuse this instruction when requested by a defendant. It also suggest that a judge "can" give the instruction, even when not requested by the defendant. Whether to give the instruction when not requested by the defendant thus appears to be left to the discretion of the trial judge. Consequently, giving the instruction, though not requested by defendant, was not error here.

2. Jury Instruction # 33 was properly given.

Defendant argues that jury instruction # 33 "was an impermissible emphasis on the importance of the majority over individual conclusions." (Brief at 14). However, instruction # 33 was properly given. Defendant's claim fails to meet the requirements for review for manifest error because there was no error. Jury Instruction # 33 properly advised the jurors of their duty to confer with their fellow jurors.

> The Court instructs the Jury that although the verdict to which each Juror agrees must of course, be each Juror's own conclusion, and not a mere acquiescence in the conclusion of fellow Jurors yet, in order to bring eight minds to a unanimous result the jurors should examine with candor the questions submitted to them, with due regard and deference to the opinions of each other. A dissenting Juror should consider whether their state of mind is a reasonable one, when it makes no impression on the minds of so many Jurors equally honest, equally intelligent, who have heard the same evidence, with an equal desire to arrive at the truth, under the sanction of the same oath. You are not to give up a conscientious conclusion after you have reached such a conclusion finally, but it is your duty to confer with your fellow Jurors carefully and earnestly, and with a desire to do absolute justice both to the State and to the defendant.

(R. 167).

Defendant argues that this instruction should not have been given before the jury's initial deliberations, and that if it is permissible at all, it should only be given when there are

indications of jury deadlock (Brief at 14). He cites no case law or other authority in support of his position. This issue is inadequately briefed.

Rule 24 (a)(9), Utah Rules of Appellate Procedure, requires an appellant to include his "contentions and reasons . . . with respect to the issues presented," including "citations to the authorities, statutes and parts of the record relied on." Issues inadequately briefed under this rule should not be addressed. *See State v. Gamblin*, 2000 UT 44, ¶ 6, 1 P.3d 1108 (refusing to consider argument which is inadequately briefed); *MacKay v. Hardy*, 973 P.2d 941, 947-48 (Utah 1998). Utah courts have consistently held that issues not properly briefed should not be addressed on appeal. *See State v. Wareham*, 772 P.2d 960, 966 (Utah 1989). "'A reviewing court is entitled to have the issues clearly defined with pertinent authority cited.'" *State v. Snyder*, 932 P.2d 120, 130 (Utah App. 1997) (citing *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)); *see also State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (holding that "rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority"); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989) (holding that brief "must contain some support for each contention").

This Court is not "'a depository in which the appealing party may dump the burden of argument and research.'" *State v. Jaeger*, 973 P.2d 404, 410 (Utah 1999) (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)), *and see Thomas*, 961 P.2d at 305. Accordingly, petitioner's claim should be rejected because it is inadequately briefed. *See Jaeger*, 973 P.2d at 410 (refusing to consider appellant's claim due to the lack of meaningful analysis of cited authority); *Wareham*, 772 P.2d at 966 (refusing to address claim on appeal where petitioner's

brief "wholly [lacked] legal analysis and authority to support his argument"); *State v. Bryant*, 965 P.2d 539, 548-49 (Utah App. 1998) (same); *State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992) (same).

However, even if defendant had adequately briefed this issue, he would still not be entitled to relief because the instruction was properly given. The defendant in *State v. Brown*, 853 P.2d 851 (Utah 1992), raised this same issue. Even though Brown failed to object to the instruction at trial, he argued on appeal that the trial court erroneously gave an *Allen*-type[10] instruction to the jury before it began its deliberations.

The instruction given in *Brown* was identical to instruction # 33 given in this case. *See Brown*, 853 P.2d at 861. In *Brown*, the Court said: "We reject Brown's assertion that this instruction 'deprive[d] the Defendant of the benefit of the convictions of each individual juror.'" *Id.* The Utah Supreme Court concluded that "[t]he trial court did not err in allowing this instruction." *Id.*

The trial court committed neither manifest or any other sort of error in giving jury instructions # 30 or # 33.

III. Because he did not assert in the trial court that the Information was defective, defendant is precluded from raising this issue on appeal.

The defendant alleges that the Information was defective because it used the same language to charge two counts of attempted aggravated murder without including any way

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[10] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154 (1896).

to distinguish the particular acts constituting each separate offense (Brief at 14-15). The language used in count one and count two of the information was identical (R. 1-20. However, defendant did not object to the Information in the trial court.

The appropriate remedy for a facially defective information is amendment. *State v. Strand*, 674 P.2d 109, 113 (Utah 1983); *State v. Montoya*, 858 P.2d 1027, 1030 (Utah App 1993). Defendant never gave the prosecution the opportunity to amend the information because he never objected to the information in the trial court. Defendant also never requested a Bill of Particulars. Defendant thus failed to preserve this issue for appeal. *State v. Hall*, 671 P.2d 201, 202 (Utah 1983) (defendant made no objection to the validity of the information to the trial court, consequently he was precluded from raising the issue on appeal); *State v. Wilcox*, 808 P.2d 1028, 1032 (Utah 1991) (if a defendant fails to request a bill of particulars and a response would have cured the deficiency, then he is deemed to have waived the constitutional right to adequate notice); *see also State v. Fulton*, 742 P.2d 1208, 1215 (Utah 1987), *cert denied*, 484 U.S. 1044, 108 S.Ct. 777 (1988).

A. Invited Error

The jury instructions given at trial used the same language as the information for counts I and II (R. 135). The jury instructions also used identical language in describing the elements that must be proved to convict defendant of counts I and II (R. 138, 141). Defendant did not object to these instructions. In fact, as described above, he affirmatively approved the instructions (T. 169).

On appeal, defendant does not alleges that these jury instructions were erroneous.

However, these jury instructions use the same language as was used in the information, and defense counsel affirmatively approved the jury instructions. Affirmatively leading the trial court to believe there was nothing wrong with the instructions amounts to "invited error." *Anderson*, 929 P.2d at 1109. Therefore, even if the language in the information and in the jury instructions was error, it was invited error. Defendant cannot take advantage of an error committed at trial when he led the court into committing the error. *Anderson*, 929 P.2d at 1109.

B. Lack of Specificity

Defendant alleges that because of "the lack of specificity of the two (2) Counts, it is not possible to know the particular acts on which the jury based its conviction under Count I and the acts the jury found did not justify a conviction under Count II." (Brief at 15).[11] Even if this issue were not waived by defendant's failure to raise the issue in the trial court, and by the doctrine of invited error, defendant would still not be entitled to relief, because any error was harmless. A review of the record establishes that the jury was advised as to which count included what acts. In his closing argument, the prosecutor clarified for the jury which acts related to count I and count II.

> Let me go through each of the counts and just tell you where we're coming from. Count number one is attempted aggravated murder. Now, that involves after the defendant got in the home of Kristy Lamb he shot Mr. . . .

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[11] Defendant does not specifically assert a lack-of-unanimity claim or cite any cases discussing the unanimity requirement, such as *State v. Evans*, 2001 UT 22, 20 P.3d 888; *State v. Russell*, 733 P.2d 162 (Utah 1987), or *State v. Tillman*, 750 P.2d 546 (Utah 987) (Brief at 14-15).

Lee Duong. . . .

Count two is after he chases Mr. Duong outside, then he tries to shoot him again and that's count number two. Now, it doesn't specifically say that on each count, but that's what each one is intended to address.

(T. 178).

Defendant did not object to the prosecutor's characterization of counts one and two. He also did not argue differently in his closing argument (T. 189-201). In fact, in his closing argument, defense counsel apparently agreed with the State's characterization of counts one and two. Defense counsel said:

> As for count one, as the State's indicated, they – they agree that that's – that's a questionable case, that the defendant intentionally or knowingly attempted to cause the death of Lee Duong.
>
> * * *
>
> Now, as for count two, that's -- that's another difficult one, but I ask you to remember back during the trial. There was testimony that a shot was fired. Who – and Kristy said she didn't know if it was a shot or not. She asked – and there might have been a shot, there might not. There was no casing found. As you know, the testimony was they never found a second casing.
>
> But even if you guys decide the shot was fired, how do you know he fired it at him? How does anybody know what happened out there in the darkness? Did anybody say that outside Mr. Carreno pointed the gun again at him and fired and missed? Did anybody say that? No. A shot was fired. Did he fire it up in the air, did he fire it at the ground, did he trip and it went off into the ground or trip and it went off in the air? Did he drop it and it went off on the sidewalk? Who knows? And that – you can't convict him of something you don't know of.

(T. 193-94).

Thus, both parties argued to the jury that count one referred to the shooting of Mr. Duong that occurred inside the apartment, and count two referred to the shot that occurred outside the apartment. The jury convicted defendant of count one and acquitted him of count

two (R. 171-72). There is no evidence or indication that the jurors misunderstood or were confused about which acts count one referred to, or that they were not unanimous in their determination that the defendant was guilty of attempted aggravated murder for shooting Mr. Duong in the apartment.

IV. Defendant has failed to establish that he received ineffective assistance of counsel.

Defendant alleges that he received ineffective assistance of trial counsel because his counsel failed to object to jury instructions # 30 and # 33, and because he failed to perform a complete investigation (Brief at 16-17).

The burden of proving a claim of ineffective assistance of counsel is heavy. To prevail on a claim of ineffective assistance of counsel, defendant must meet the two-part test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997). "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*; *State v. Diaz*, 2002 UT App. 288, ¶ 38, 55 P.3d 1131.

To satisfy the first prong of the *Strickland* test, defendant must demonstrate that counsel's "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *Accord Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 115 S. Ct.

431(1994). "Proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality. *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993)." *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998).

The court will not second-guess counsel's legitimate strategic choices. *Strickland*, 466 U.S. at 689. Defendant must overcome the strong presumption that counsel's performance fell "within the wide range of reasonable professional assistance." *Id. See also State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1993), and *State v. Wood*, 648 P.2d 71, 91 (Utah 1982), *cert. denied*, 459 U.S. 988 (1982).

To satisfy the second, or prejudice, prong of the *Strickland* test, defendant must show that he was actually prejudiced by any alleged deficient performance. To meet this criteria, defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Dunn*, 850 P.2d at 1225. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

To succeed in his claim of ineffective assistance of counsel, defendant must meet both prongs of the test. "Failure to satisfy either prong will result in our concluding that counsel's behavior was not ineffective." *Diaz*, 2002 UT App 288, ¶ 38. Furthermore, the "object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *State v. Frame*, 723 P.2d 401, 405 (Utah 1986) (citations omitted).

A. Trial counsel cannot be ineffective for failing to object to jury instructions that were not erroneous.

As demonstrated above, the trial court did not err in giving jury instructions # 30 and # 33. Since these instructions were proper, trial counsel cannot be deficient for failing to object to them. "[T]rial counsel's 'failure to raise futile objections does not constitute ineffective assistance of counsel.'" *Diaz*, 2002 UT App. 288, ¶ 39 (citing *State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546).

B. Defendant has failed to establish that his counsel was ineffective for failing to adequately investigate.

Defendant alleges that his trial counsel was ineffective because he did not adequately pursue investigation of the case (Brief at 9). However, defendant has provided no evidence or record cites to establish what counsel did or did not investigate. This issue is inadequately briefed. As demonstrated above, issues inadequately briefed should not be addressed. *See State v. Gamblin*, 2000 UT 44, ¶ 6, 1 P.3d 1108 (refusing to consider argument which is inadequately briefed).

From the record alone, it is impossible to establish whether counsel adequately investigated. "[D]efendant bears the burden of assuring the record is adequate." *State v. Litherland*, 2000 UT 76, ¶ 16, 12 P.3d 92. "Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *Litherland*, 2000 UT 76, at ¶ 17. Defendant cannot establish that his counsel's performance was deficient for failing to investigate when he has failed to establish what investigation counsel performed.

Utah law has held that failure to adequately investigate the underlying facts of a case cannot fall within the wide range of reasonable professional assistance and cannot be considered a tactical decision. *State v. Templin*, 805 P.2d 182, 188 (Utah 1990). However, simply alleging that counsel failed to adequately investigate is not sufficient to prove a claim of ineffective assistance of counsel. Defendant must show that his counsel actually failed to investigate, and must detail what any further investigation would have revealed. *See State v. Strain*, 885 P.2d 810, 818 (Utah App 1994); *State v. Johnson*, 2000 UT App 290, ¶¶ 18-20, 13 P.3d 175. Defendant Carreno has failed to do this.

Defendant has failed to establish any prejudice because he has failed to establish or even allege what further investigation could have discovered. Defendant alleges that his trial counsel failed to make a complete investigation of the basis for defendant's need to take a gun to his wife's apartment and the basis for him being frightened (Brief at 17). But a defendant "cannot meet the prejudice prong of the *Strickland* test simply by identifying unexplored avenues of investigation. Rather, he must demonstrate a reasonable probability that further investigation would have yielded sufficient information to alter the outcome." *Parsons v. Barnes*, 871 P.2d 516, 523-24, (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *see also State v. Price*, 909 P.2d 256, 265 (Utah App. 1995).

Defendant Carreno has failed to demonstrate a reasonable probability that further investigation would have altered the outcome of his trial. He has therefore failed to meet the prejudice prong of the test and has failed to establish ineffective assistance of counsel.

CONCLUSION

Based on the arguments set forth above, the State asks this Court to affirm the conviction and sentence of defendant Carreno.

RESPECTFULLY SUBMITTED this 15th day of September, 2004.

MARK L. SHURTLEFF
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Erin Riley

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Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of September, 2004, I mailed, postage prepaid, two accurate copies of the foregoing Plaintiff/Appellee's Brief to:

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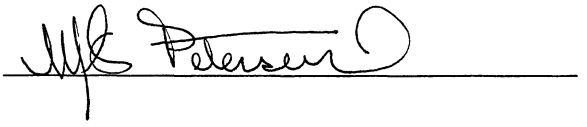

Addendum A

U.C.A. 1953 § **77-32-301**

C

West's Utah Code Annotated Currentness
Title 77. Utah Code of Criminal Procedure
Chapter 32. Indigent Defense Act (Refs & Annos)
Part 3. Counsel for Indigents

→§ 77-32-301. Minimum standards for defense of an indigent

Each county, city, and town shall provide for the defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with the following minimum standards:

(1) provide counsel for each indigent who faces the substantial probability of the deprivation of the indigent's liberty;

(2) afford timely representation by competent legal counsel;

(3) provide the investigatory resources necessary for a complete defense;

(4) assure undivided loyalty of defense counsel to the client;

(5) proceed with a first appeal of right; and

(6) prosecute other remedies before or after a conviction, considered by defense counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

Laws 1980, c. 15, § 2; Laws 1981, c. 67, § 1; Laws 1983, c. 52, § 1; Laws 1995, c. 166, § 6, eff. May 1, 1995; Laws 1997, c. 354, § 5, eff. July 1, 1997.

Codifications C. 1953, § 77-32-1.

U.C.A. 1953 § **77-32-301**, UT ST § **77-32-301**

Current through End of 2004 3rd Sp. Sess.